IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3973 OF 2005

Heena Hasmukh Soni ..Petitioner.
Versus
Shri Hasmukh Anandji Soni ..Respondent.

Ms. Gauri Godse for the Petitioner.
Mrs Amruta Gokhale for the Respondent.

CORAM : S. A. BOBDE, J.
DATED : 13TH OCTOBER, 2005.

P.C.:

1. The parties have tendered consent terms, which are taken on record and marked ‘X’ for identification. The consent terms are signed by the parties as well as their Advocates.

2. One of the terms of the consent terms, vide para 3 (v), is to the effect that the marriage solemnized between the parties on 7th May, 1998 dissolved under section 13-B of the Hindu Marriage Act, 1955; hereinafter referred to as ‘the Act’; from the date of the order of this court i.e. today.

3. Ms. Godse, the learned counsel for the petitioner, who is supported by the learned counsel for the respondent, states that though there is no identical precedent on facts, this court can exercise

its power to grant divorce by a mutual consent without compelling the parties to wait for statutory period of six months, provided by section 13(b) of the Act. Ms. Godse relied on a judgment of the Division Bench of the Andhra Pradesh High Court in the case of K. Omprakash vs. K. Nalini, reported in 1986 Andhra Pradesh 167. The relevant para 10 of the judgment reads as follows :-

> "For all the above reasons, we are of the opinion that S. 13-B(2) of the Hindu Marriage Act should be read as directory only. Section 13B(2), no doubt cautions the Courts of its duty to fight the last ditch battle to save the marriage; but when the Court is fully satisfied, on the basis of the proved facts, that in the interests of justice of the society and the individuals marriage tie should be put asunder immediately, S. 13-B(2) does not impose any fetter on the powers of the Court to grant instant decree of divorce. At any rate, we are clearly of the opinion that the time -table fixed by S. 13-B(2) does not apply to an appellate Court. The great Telugu poet Vemana said that the broken iron can be joined together, but not broken hearts.

> Parties have been living apart for long and their wedlock has not virtually become a deadlock. Chances of reunion had completely faded away. In these circumstances, we think it just and proper to grant a decree of divorce straightway. Accordingly, we pass a decree of divorce declaring the marriage between the appellant and the respondent as dissolved with immediate effect."

4. The above judgment supports the submission of the learned counsel for the petitioner. More over, the learned counsel for the petitioner has relied on Chandrakala Menon (Mrs) and Anr. vs. Vipin Menon (Capt) and Anr., reported in (1993) 2 Supreme Court Cases 6, where the Supreme Court granted a decree of divorce by mutual consent under section 13-B of the Act and dissolved the marriage between them with immediate effect having regard to the fact that the parties were living separately for over a period of one year and a petition for divorce by mutual consent has been pending. In the present case, it is true that the petition for divorce by mutual consent is not pending; however, the parties are living separately since August, 2000 i.e. over a period of five years.

The respondent husband had sued the petitioner for divorce inter-alia on the ground of cruelty and desertion and it is clear that it is not possible for them to co-habit as man and wife. In other words, the marriage seems to have broken down beyond redemption.

5. There is another judgment of the Supreme Court in the case of Radha vs. Mohinder Kumar, reported in (1998) 8 Supreme Court Cases 530, where though the petition for divorce by mutual consent was not pending, but since the parties were desired that the marriage between them may be dissolved but not on annulment and instead by "mutual consent" effective from the date of the High Court judgment i.e. 29.07.1994; Their Lordships acceded to the request of the parties and ordered that "the marriage between the parties stood dissolved by a decree of divorce upon mutual consent.

6. In Shail (smt) vs. Manoj Kumar & Ors. (2004) 4 Supreme Court Cases 785, the Supreme Court in regard to the scope of powers under Article 227 of the Constitution of India made the following observations vide para 3 :-

"In Surya Dev Rai vs. Ram Chander Rai , this

> Court has held that in exercise of power of superintendence conferred under Article 227 of the Constitution of India on the High Court, the High Court does have power to make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the inferior court or tribunal as to the manner in which it would proceed hence and the High Court has the jurisdiction also to pass itself such a decision or direction as the inferior court or tribunal should have made. The jurisdiction under Article 227 of the Constitution is to be exercised sparingly and with care and caution, but it certainly one vesting in the High Court and meant to be exercised in appropriate cases."

7. In the circumstances of the case, I am satisfied that this is a fit case to exercise an extraordinary jurisdiction of this court and pass an order which the trial court would itself have passed and there is no any hesitation for me in granting a divorce by mutual consent, particularly, since the court is satisfied that the request of the party is genuine, instead of relegating the parties to further expenditure of time and money and mental harassment, I

am of view that the consent terms granting a decree for divorce by mutual consent should be passed in the present case and I accordingly, dispose of the matrimonial dispute between the parties in accordance with the said consent terms, except as to the date of dissolution of marriage which shall be as ordered below.

8. The trial court shall pass a decree of divorce by mutual consent in accordance with the consent terms, within a period of 15 days from the date the parties appear before the trial court. The parties are directed to appear before the trial court on 24th October, 2005.

9. All concerned to act on an authenticated copy of this order.

DT. 13.10.05 (S.A.BOBDE,J)

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